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Docket No. 88-1733

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

Petitioner,

v.

DORIS STAMEY

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND SUGGESTION FOR SUMMARY REVERSAL

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QUESTION PRESENTED

In its Petition for a Writ of Certiorari, Southern Bell states the question presented as whether the Eleventh Circuit erred when it entered judgment against Southern Bell on a claim of age discrimination after it had reversed the District Court's grant of a directed verdict on that claim. That question can only be fashioned by mischaracterizing the Court of Appeal's opinion, and by omitting reference to material parts of the record. When all of the relevant facts are considered, it is plainly apparent that the question presented by Southern Bell in seeking a writ of certiorari is, at best, hypothetical.

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Statutory Authority

Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et. seq.* 2

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OPINIONS BELOW

The March 24, 1987 district court order providing for equitable relief is reported at 658 F.Supp. 1152 (N.D. Ga. 1987). The November 4, 1988, opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 859 F.2d 855 (11th Cir. 1988).

JURISDICTION

Petitioner, Southern Bell Telephone and Telegraph Company, has invoked the jurisdiction of this court pursuant to 28 U.S.C. §1254(1). As the question presented by Southern Bell is hypothetical in nature, respondent submits that the court is without jurisdiction to grant the petition. *Asbury Hospital v. Cass County*, 326 U.S. 207 (1945).

RESPONDENT'S STATEMENT OF THE CASE

Southern Bell's statement of the case fails to present an accurate picture of where the matter stands. In this age discrimination case, the Eleventh Circuit held that the District Court was in error when it granted Southern Bell's motion for a directed verdict on Stamey's promotion claim. The Eleventh Circuit did not enter a judgment in favor of Stamey on that claim, as Southern Bell suggests. Rather, the Court of Appeals remanded the case to the District Court to reconsider equitable relief in a manner that is consistent with that ruling, and with the facts already found by the trial jury. The following chronology is provided to describe the hypothetical nature of Southern Bell's argument.

This case proceeded to trial on four different theories of liability. Respondent claimed that Southern Bell had terminated her, had retaliated against her, had failed to promote her, and had failed to pay her management level compensation on account of her age. In petitioning for certiorari, Southern Bell only mentions the promotion claim. Specifically, Southern Bell fails to acknowledge that at trial, Stamey proved that she had actually been performing management level work, but that Southern Bell refused to pay her management compensation for that work on account of her age. (*See* Petition for Certiorari, App. A. at 4). The jury's verdict on August 23, 1985, determined that Southern Bell had willfully failed to pay Stamey management compensation on account of her age, and awarded damages for that loss.[1]

In an order entered on June 23, 1986, the District Court determined that reinstatement was the appropriate equitable remedy. Since it had directed a verdict on Stamey's promotion claim, the District Court agreed with Southern Bell's argument that Mrs. Stamey should only be reinstated to a nonmanage-

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[1]The District Court granted a directed verdict based on Southern Bell's argument that plaintiff had proved no promotion within the 180 day period preceding plaintiff's charge of discrimination. 29 U.S.C. §626(d)(1). Since the plaintiff showed, however, that her position had been filled by a younger management employee, the Eleventh Circuit observed that it could not be plainer that Stamey was passed over for that promotion opportunity by being terminated.

ment position. In its order, the court reasoned as follows: ". . . the court agrees with defendant that reinstatement to a management position is not required. Plaintiff's claim that she was denied the opportunity to be promoted into one of the various management positions that she alleges were successor positions to her customer instructor title was dismissed by this court. For this reason plaintiff is only entitled to be reinstated to a position similar to that provided other Customer Instructors upon the termination of their position." (June 23, 1986 Order, pp. 7-8). The Eleventh Circuit observed this to be the wrong comparison. (*See* Petition for Certiorari, App. A at n. 17).

It is therefore quite certain that the District Court based its decision on equitable relief on the directed verdict which the Court of Appeals found to be in error. The Eleventh Circuit has simply sent this case back to the District Judge to reassess that matter free of the error which influenced its earlier decision. Such an assessment, of which Southern Bell now complains, had taken place earlier without complaint.

Even though the District Court denied reinstatement to a management position because of the directed verdict, in its order of March 24, 1987, 658 F.Supp. at 1156, the District Court concluded that Stamey should receive backpay at a management level from the date of the jury's verdict, August 23, 1985, until July 23, 1986, the date it found Stamey to have been unreasonably denied reinstatement to a nonmanagement level. The court explained that Stamey was entitled to management level compensation for this period because the jury had found that Southern Bell had willfully discriminated in pay and benefits, and that its order should conform to those findings of fact. 658 F.Supp. at 1156. Likewise, any order of the District Court on remand should conform to the verdict, and to the Eleventh Circuit's opinion.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petition for a Writ of Certiorari should be denied for the simple reason that there is nothing before the court, other than a hypothetical question, for review. The Eleventh Circuit found that the directed verdict granted by the District Court on

Stamey's promotion claim was in error. Therefore, the equitable relief fashioned by the District Court in reliance upon that ruling was in error. The Eleventh Circuit did not enter judgment on any claim, as Southern Bell suggests, nor did it find that Stamey had been denied a promotion on account of her age. (Petition for Certiorari at 3). It merely determined that the assessment of post verdict relief should be reexamined without the influence of the erroneous directed verdict.

The jury returned a verdict in this case that Stamey had been willfully terminated, and that she had been willfully discriminated against in pay because of her age. The case has been remanded to the District Court to reassess the matter of equitable relief in a manner consistent with those findings, and without the legal error that infected its first determination. It is the function of the District Court to determine matters of equitable relief in an age discrimination case. *O'Donnell v. Georgia Osteopathic Hospital*, 748 F.2d 1543 (11th Cir. 1984); *McNeil v. Economics Labratory, Inc.*, 800 F.2d 111 (7th Cir. 1986). In fashioning such relief, the District Court may not disregard the jury's verdict, but must base its decision on factual findings that are consistent with those made by the jury. *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1101 (8th Cir. 1982). The District Court followed these guidelines in its determination of post verdict damages from the date of the verdict until the date when it found that Mrs. Stamey had unreasonably declined reinstatement to a nonmanagement position. 658 F.Supp. at 1156. Southern Bell has not claimed any error in that assessment. The Eleventh Circuit has now said that the District Court should continue that logical process without the error that Southern Bell invited. There is no logical or legal reason for Southern Bell to now claim that it has been denied an opportunity to be heard.

CONCLUSION

In this case, Southern Bell has been fully heard on the merits. The case has been remanded to the District Court to consider the remaining matters of equitable relief in accordance with the factual findings that have already been made by the jury, and in accordance with the Eleventh Circuit's opinion which simply removed an erroneous conclusion previously reached by the District Court. *Fountain v. Filson, Inc.*, 336 U.S. 681 (1949), and the other cases cited by Southern Bell in its petition are simply inapposite. This is not a case where summary judgment has been granted without affording the losing party any notice or right to be heard. The Eleventh Circuit Court of Appeals has not resolved any factual dispute, but has simply remanded the issue of post verdict relief to the District Court for a new determination, free of the error which, at Southern Bell's invitation, adversely affected its first determination. For these reasons, it is respectfully urged that the Petition of Southern Bell Telephone & Telegraph Company for a Writ of Certiorari be denied.

Respectfully submitted,

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